BEFORE THE SUPREME COURT CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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URGENT REQUEST FOR ORDERS TO PROTECT CIVIL PARTY RIGHTS TO EFFECTIVE REPRESENTATION AND A FAIR TRIAL

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Before:

Supreme Court Chamber
Judge KONG Srim, President
Judge Chandra Nihal JAYASINGHE
Judge SOM Sereyvuth
Judge Florence Ndepele MWACHANDE-MUMBA
Judge MONG Monichariya
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I. INTRODUCTION

1. The Civil Party Lead Co-Lawyers ("LCLs") urgently request the Supreme Court Chamber ("Chamber") to rule on the core civil party rights to effective representation and fair proceedings, by instructing the Office of Administration ("OA") to (i) correctly recognise the LCL's mandate under Internal Rule 12*ter*; and (ii) ensure resources for the conduct of all activities within that mandate for the remainder of Case 002.

2. The LCLs take note of the Chamber's decision of 18 October 2021, which stated that the Chamber does not have jurisdiction over administrative decisions within the OA's authority.[1] However the matter raised by this request is not administrative in nature. It concerns the substantive rights of the civil parties under the Internal Rules. The protection of those rights, and the fairness of the proceedings during the appellate stage fall squarely (and exclusively) within the Chamber's jurisdiction for reasons which are explained below in Section II.

3. By a decision of 1 October (reasons provided on 11 October) the OA set out an unprecedently narrow and incorrect understanding of the LCLs' mandate. Based on this erroneous interpretation of civil party participation under the Internal Rules, the OA cut the LCLs' resources, terminating the core international consultant who has worked in the team through trial and reparations implementation. Recognising budgetary constraints, the ILCL proposed a means by which the consultancy could be continued *on a cost-neutral basis* so that the team maintains the resources necessary to do its core work. This has been rejected. The loss of the consultant will dramatically reduce the working capacity of the team, making effective representation of the civil parties (and therefore fair proceedings) impossible. The OA's erroneous interpretation of the LCL's mandate also puts all further resourcing requests into doubt. Although appeal submissions have concluded, the LCLs' mandate necessitates further steps, and these require a minimum level of human resources and institutional memory.

4. The OA's decision is based on a wrong understanding of the LCL's mandate (Section VI), denies necessary resources for effective representation without reasonable basis (Section VII); and violates a legitimate expectation held by the LCLs (Section VIII).

[1] **F69/1** Decision on Civil Party Lead Co-Lawyers' Urgent Request to File on One Language and for Expedited Filing Schedule, 18 October 2021, p. 2.

5. The LCLs make this filing reluctantly, being conscious of the workload faced by the Chamber. However they have been left with no alternative by the OA, particularly in light of the short notice on which the OA decision was given and the irreversible impact it will have on the effectiveness of civil party representation.

II. FACTS

6. The LCLs are currently supported by one international legal consultant (until 31 October 2021) and two national staff.[2]

7. On Tuesday 21 September 2021 the International Lead Co-Lawyer ("ILCL") submitted her quarterly resourcing request to the OA ("First ILCL memo"), explaining her workload and resourcing needs for the coming quarter, and the remainder of the case.[3] Although appeal submissions have concluded and other parties may therefore be less busy, for the LCLs a significant volume of work remains to be done, including on: (i) civil party meetings; (ii) reclassification submissions; (iii) submissions on reparations implementation; (iv) activities relating to legacy, including engagement with the Co-Rapporteurs on Residual Functions related to Victims ("Co-Rapporteurs")[4] and on ensuring accurate information related to civil party participation on the Court's website; (v) reviewing and archiving of the LCLs' documentation (including assessments on legal professional privilege). Despite this, it has been made clear to the ILCL that she is expected to reduce overall resources. In line with previous discussions with the OA, the ILCL proposed that her legal consultant be continued, while her own hours be reduced. This is the most cost-effective way to maximise available resources, so that all essential pending work can be done. Until this time, the OA had supported this approach.[5]

8. On Thursday 23 September the OA responded with a memorandum ("First OA Memo").[6] It agreed that reclassification work and reporting on reparations implementation are within the LCLs' mandate, but indicated the OA's provisional view that other tasks mentioned in the First ILCL Memo do not fall within the LCLs' mandate and therefore should not be funded. The OA also queried whether work of the LCLs should be divided between the ILCL and a consultant,

[2] Additional short-term international junior legal consultancy resources were provided for busy periods during the Case 002/02 appeal proceedings, the last being for July-August 2021.
[3] Annex A: First ILCL Memorandum dated 21 September 2021 ("First ILCL Memo").
[4] See Annex B: Call for Contributions of Ideas of the Extraordinary Chambers in the Courts of Cambodia (ECCC) Residual Functions Related to Victims.
[5] See details below at Section VIII.
[6] Annex C: First OA Memorandum dated 23 September 2019 ("First OA Memo").

particularly in light of the fact that Civil Party Lawyers ("CPLs") "are available to the LCLs". The First OA Memo requested the ILCL to provide her views on these issues.

9. On Wednesday 29 September the ILCL sent a further memorandum to the OA, responding to the issues raised in the First OA Memo ("Second ILCL Memo").[7]

10. On the evening of Friday 1 October, the ILCL was informed by the OA that it had decided to grant her *more hours* than requested, but to *terminate* her consultant post:

> 1. Your billable ceiling is approved up to 100% for October, November and December. Outreach activities which are conducted in consultation with and in coordination of the CPLs and are related to representation are payable. These, if any, must be clearly detailed in your time sheet. Work related to the website, winding down/archiving and "legacy" (including responses to the Co-Rapporteurs on victims) are not payable.
>
> 2. The legal consultant is extended under the same TORs one final time for October only.
>
> 3. The necessity of legal support additional to the lead co-lawyers shall be justified moving forward according to actual judicial needs related to the mandate of the Lead Co-Lawyers. Support in the form of consultant/s may be provided on a defined (deliverable) basis, subject to sufficient justification.[8]

11. Immediately, the ILCL requested clarification as to whether a new consultancy could be provided, albeit on different terms, or whether consulting resources would be ended in October.[9] A further request for a response was sent on Monday 4 October.[10] No response was received.

12. On Tuesday 5 October, the ILCL sent a further memorandum to the OA, seeking reconsideration ("Third ILCL Memo").[11] The ILCL noted that in the event of a negative response it would be necessary to raise the matter with the Chamber, and that time for resolving the matter is extremely short. She requested a response and reasons by Friday 8 October.

13. On the evening of 5 October, the OA official responsible responded, indicating that he "expect[ed] to have a response to [the ILCL] next week".[12]

14. On 6 October the ILCL again emailed the seeking at least a brief clarification as to whether her consulting resources were being terminated, pending full reasons, so that she could organise her team's work accordingly.[13] No response was received.

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[7] Annex D: Second ILCL Memorandum dated 29 September 2021 ("Second ILCL Memo").
[8] Annex E: Email exchange between OA and ILCL, pp. 3-4 (Email from OA to ILCL, 1 October 2021).
[9] Annex E: Email exchange between OA and ILCL, p. 3 (Email from ILCL to OA, 2 October 2021).
[10] Annex E: Email exchange between OA and ILCL, pp. 2-3 (Email from ILCL to OA, 4 October 2021).
[11] Annex F: Third ILCL Memorandum, 5 October 2021 ("Third ILCL Memo").
[12] Annex E: Email exchange between OA and ILCL, p. 2 (Email from OA to ILCL, 5 October 2021).
[13] Annex E: Email exchange between OA and ILCL, pp. 1-2 (Email from ILCL to OA, 6 October 2021).

15. On 8 October, the ILCL emailed the OA again, indicating that the LCLs were intending to submit a filing to the Chamber, and asking whether the OA would agree to maintain consulting resources during the litigation. In the same email the ILCL indicated that failing a change of circumstances by Monday, she would task her consultant with closing and organising her emails and files, and requested the OA to confirm that it would remunerate the ILCL for directing and supervising that task.[14] No response was received.

16. On 11 October 2021 the OA sent a memorandum providing reasons for the 1 October decision, and refusing reconsideration ("Second OA Memo").[15]

17. On the evening of 12 October the LCLs filed their Urgent Request to File in One Language and for an Expedited Filing Schedule, and sent a courtesy copy to the Chamber and parties.[16]

18. On 18 October the Chamber issued a decision refusing the request.[17]

19. Also on 18 October the ILCL consultant received an email informing her of her separation on 31 October. The ILCL has received no response to her emails of 2, 4, 6 and 8 October 2021.

III. RELEVANT LEGAL FRAMEWORK

20. The LCLs rely in particular on Internal Rules 12*ter*, 23(3) and 12, which set out the framework for civil party representation and the LCLs' relationship with the OA.

IV. THE CHAMBER'S POWER TO DETERMINE THIS MATTER

21. The chamber seized of a case has the inherent power and duty to ensure the fairness of the proceedings. It is well established, both at this Court[18] and other international tribunals,[19] that this

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[14] Annex E: Email exchange between OA and ILCL, p. 1 (Email from ILCL to OA, 8 October 2021).
[15] Annex G: Second OA Memo, 11 October 2021 ("Second OA Memo").
[16] **F69** Civil Party Lead Co-Lawyers' Urgent Request to File in One Language and for an Expedited Filing Schedule, 12 October 2021. It was notified on 13 October 2021.
[17] **F69/1** Decision on Civil Party Lead Co-Lawyers' Urgent Request to File on One Language and for Expedited Filing Schedule, 18 October 2021.
[18] See esp.: **Case 004 – D304/1** Decision on AO An's Request to Order DSS to Provide Additional Resources, 18 March 2016, esp. at paras 6-7; **Case 004 – D304/4** Further Decision on AO An's Request to Order DSS to Provide Additional Resources, 26 April 2016, esp. at para. 18. The CIJs referred to relevant decisions from the ICTY. See especially: *Prosecutor v Šešelj*, IT-03-67-R33B, Public Redacted Version of the "Decision on the Registry Submissions Pursuant to Rule 33(B) Regarding the Trial Chamber's Decision on Financing of Defence" Rendered on 8 April 2011, 17 May 2011, paras 19-20; *Prosecutor v Karadžić*, IT-95-5-1- PT, Decision on Accused Motion for Adequate Facilities and Equality of Arms: Legal Associates, 28 January 2009, para. 12.
[19] In addition to the ICTY cases cited above, see for example: SCSL, *Prosecutor v Brima*, SCSL04-16-PT, Brima – Decision on Applicant's Motion Against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel, 6 May 2004, paras 29-71; *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Sesay Defence Application I – Logistical Resources, 24 January 2007, pp. 3-4; ICTY, *Prosecutor v Šešelj*, IT-03-67-PT, Decision on the Financing the Defence of the Accused, 30 July 2007, paras 33-37; ICC,

power includes resolving matters of resourcing where this affects the parties' rights to a fair trial and/or the fairness of the proceedings. At the ECCC that power has been exercised repeatedly by the Co-Investigating Judges ("CIJs") during pre-trial.[20] In the present case the Trial Chamber also raised matters of Defence resourcing with the OA in order to ensure a fair trial.[21]

22. Case 002/02 is before the Chamber. The Internal Rules applicable to the Trial Chamber are applicable, *mutatis mutandis*, to the Chamber.[22] The inherent powers to maintain the rights of the parties and the fairness of proceedings, which the CIJs held that they have during the investigation,[23] must now be possessed by the Chamber. Indeed, the Chamber has recognised in respect of the civil parties that "it is the Chamber's duty to ensure that their rights are upheld to safeguard the overall integrity of the proceedings."[24]

23. In addition to the Chamber's inherent powers regarding fair trial rights, it is also well established that in international criminal tribunals a chamber is empowered to review and quash an administrative decision where the decision-maker:

> (a) failed to comply with […] legal requirements […], or
>
> (b) failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision, or
>
> (c) took into account irrelevant material or failed to take into account relevant material, or
>
> (d) reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached (the "unreasonableness" test).[25] [ellipses original]

Prosecutor v Bemba Gombo, Redacted version of "Decision on legal assistance for the accused", ICC-01/05-01/08-567-Red, 26 November 2009, para. 106.

[20] See for example: **Case 004 – D304/1** Decision on AO An's Request to Order DSS to Provide Additional Resources, 18 March 2016, esp. at paras 6-7; **Case 004 – D304/4** Further Decision on AO An's Request to Order DSS to Provide Additional Resources, 26 April 2016, esp. at para. 18; **Case 004 – D304/7** Decision on Resources to be Provided to the AO An Defence, 9 May 2016; ; **Case 004 – D312/1** Decision on YIM Tith's Urgent Request Concerning Defence's Resources, 7 June 2016; **Case 004 – D312/4** Second Decision on YIM Tith's Urgent Request Concerning Defence's Resources, 14 June 2016; **Case 004 – D304/11** Decision on AO An's Urgent Request for Continued Provision of Necessary Resources, 16 August 2016; **Case 004 – D321/1** Decision on the Urgent Request on Remote Working, 23 August 2016, esp. at para. 9.

[21] **E320/1** Trial Chamber Memorandum: Ruling following TMM of 28 October 2014, 31 October 2014, para. 7; **E369** Trial Chamber Memorandum: Request for clarification on additional resources for Defence teams in Case 002/02, 23 September 2015; **E369/2** Trial Chamber Memorandum: Request for clarification on additional resources for Defence teams in Case 002/02, 1 October 2015; **E363/3** Decision on KHIEU Samphan Defence Motion Regarding Co-Prosecutors' Disclosure Obligations, 22 October 2015, para. 38.

[22] Internal Rule 104*bis*.

[23] See the decisions referenced above in footnote 18**Error! Bookmark not defined.**.

[24] **F65** Decision on the Civil Party Lead Co-Lawyer's Request for Postponement of the Appeal Hearing and Instructions With Regard To New Dates and Modalities for the Appeal Hearing, 10 June 2021, para. 51.

[25] *Prosecutor v Karadžić*, IT-95-5/18-T, Decision on the Request for Review of Registrar Decision and for Summary Reversal, 7 May 2012, para. 4.

24. The LCL's recognise that, before some tribunals, an exception to the seized chamber's inherent fair trial power exists where another forum (for example the Presidency) is explicitly provided with jurisdiction on the particular type of issue: in such instances the seized chamber may only intervene after all other remedies are exhausted.[26] At the ECCC, Defence resourcing disputes have often been handled by a specially appointed "Administrative Judge".[27] However, that procedure exists by virtue of a clause in the Legal Services Contract which UNAKRT enters into with international Co-Lawyers for the defence.[28] No equivalent Legal Services Contract exists for the ILCL. Therefore, if the Chamber were not empowered to deal with the matter, the LCLs would be without a remedy. The result would be that the OA is not subject to oversight even where it is wrongly interpreting the parties' mandates under the Internal Rules in such a way as to undermine effective representation and fair proceedings. As the Special Court for Sierra Leone explained, that approach should be rejected because it would effectively grant a court's administration immunity and would mean that there was no mechanism by which to "check and curb arbitrary acts, conduct, or decisions taken by our Administrative Officials".[29]

V. CIVIL PARTY RIGHTS TO FAIRNESS AND EFFECTIVE REPRESENTATION

25. Civil parties are parties to ECCC proceedings[30] and have a right to fairness in those proceedings in accordance with article 14(1) of the International Covenant on Civil and Political Rights.[31] Recently the Chamber reiterated that "civil parties are integral to the proceedings and the Court shall ensure that their rights are respected."[32]

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[26] ICTY, *Prosecutor v Blagojević*, IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003, para. 7; STL, *Prosecutor v Ayyash et al.*, STL-11-01/PT/PTJ, Decision on Forum for Review of the Registrar's Decision in Relation to the Assignment of a Local Resource Person, 9 November 2012, para. 29.

[27] See for example: United Nations Administrative Judge, Case No. UNAKRT/UNAJ/SCC/2019/1, Decision on Urgent Appeal by Co-Lawyers for KHIEU Samphân of Defence Support Section's Decision Refusing the Recruitment of an International Legal Consultant (Level 3) Effective 1 October 2019, 30 December 2019.

[28] Article 11.1 of the Legal Service Contract. See *ibid*., para. 28. A copy of the Legal Services Contract template is found in the casefile as document **E320/2//2/1.1**.

[29] SCSL, *Prosecutor v Brima*, SCSL04-16-PT, Brima – Decision on Applicant's Motion Against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel, 6 May 2004, para. 67.

[30] Internal Rules Rev. 9, Glossary; **Case 001 – F28** Appeal Judgement, 3 February 2012, para. 488.

[31] **F26/2/2** Decision on Co-Prosecutors and Civil Party Lead Co-Lawyers' Request for Additional Time for Examination of SCW-5, 30 June 2015, para. 7.

[32] **F65** Decision on the Civil Party Lead Co-Lawyer's Request for Postponement of the Appeal Hearing and Instructions With Regard To New Dates and Modalities for the Appeal Hearing, 10 June 2021, para. 51.

26. Among the fair trial rights owed to civil parties is the right to legal representation.[33] This right includes a requirement that such representation is effective.[34]

27. Effective representation requires having sufficient resources to carry out essential tasks and meet professional obligations. The impact of the OA's decision is to reduce from two person to one the international side of the ILCL team; removing the core team member who served the team through trial and reparations proceedings. For reasons which are explained below, this diminishment of human resources will make it impossible for the LCLs and CPLs to undertake all the essential work necessary for effective representation before and after the delivery of the appeal judgment, including coordinating CPLs, ensuring meetings with civil parties take place and that the resulting information is tracked by the Section, and undertaking essential filings.

VI. THE OA'S ERRORS REGARDING SCOPE AND NATURE OF LCL'S MANDATE

28. The ECCC's unique system for civil party representation is established by the Internal Rules, particularly Internal Rules 12*ter* and 23(3). The relationship between the LCLs and the OA is addressed in Internal Rule 12. The OA's decision wrongly understands the scope and nature of this system in three respects. The following submissions explain each of these errors and how they undermine civil parties' rights to effective representation and fair proceedings.

A. The relationship between the LCLs and the CPLs

29. The OA appears to acknowledge that the LCLs have significant work to undertake,[35] but takes the position that an international consultant is not required because use can instead be made of CPLs. Thus, for example, the OA states that: "according to our records you are statutorily

[33] **Case 001 – F28** Appeal Judgement, 3 February 2012, paras 488-489.
[34] See for example: ECtHR, *Artico v Italy*, App. No. 6694/74, Judgment, 13 May 1980, para. 33 (excerpt on case file at **F40/1.1.1.5**). "Effective representation" is also the standard used in the Defence Legal Assistance Scheme. See Annex H: ECCC Legal Assistance Scheme (Amended December 2014), paras D(1) and F(14); also para. E(1) which refers to "effective defence". In the context of a recent Administrative Judge decision the OA (DSS) appears to have recognised that its responsibility in the context of resourcing is to ensure effective representation, at least on the defence side: see United Nations Administrative Judge, Case No. UNAKRT/UNAJ/SCC/2019/1, Decision on Urgent Appeal by Co-Lawyers for KHIEU Samphân of Defence Support Section's Decision Refusing the Recruitment of an International Legal Consultant (Level 3) Effective 1 October 2019, 30 December 2019, para. 85.
[35] The need to prepare filings on reclassification and reparations implementation and to arrange and oversee the process of meetings with civil parties appears to be accepted: Annex E: Email exchange between OA and ILCL, pp. 3-4 (Email from OA to ILCL, 1 October 2021).

supported by 18 CPLs, nine of whom are foreign lawyers",[36] and asks "why the corpus of CPLs is… insufficient to provide support services."[37]

30. In the Second ILCL Memo, the ILCL explained the difference between delegating work to a consultant, versus seeking input from CPLs under Internal Rule 12*ter*(6):[38]

> My relationship with the CPL as set out in the Internal Rules is not one of supervision. I may not task them with work and they are not accountable to me. This is a very different relationship to the one which I have with consultants working in the Section. Those consultants are ultimately responsible to me for their work.

31. This argument does not appear to have been seriously considered by the OA. It responds that "[c]ontrary to your statement that the IRs do not grant the LCLs a supervisory line to the CPLs, IR 12*ter*(6) requires the LCLs to "*coordinate* actions by the CPLs undertaken by way of […] support" [emphasis original].[39] The OA thus equates coordination with supervision. This misunderstands the relationship between the LCLs and CPLs.

32. The LCLs do not supervise or direct the CPLs. Internal Rule 12*ter*(6) states that any support shall be "mutually agreed".

33. This means that the LCLs cannot direct the CPLs to undertake an activity such as preparing a draft or carrying out research in Zylab. CPLs may agree to assist when they have availability, but this is different from having a team member who is obliged to undertake work as required. In practice, the LCLs coordinate with the CPLs to seek agreement on submissions. The LCLs also fundraise and coordinate with the Victims Support Section ("VSS") to arrange civil party meetings, most of which are carried out by CPLs, with the LCLs providing key messages and collating the views and instructions received. This role played by the CPLs is essential to the functioning of civil party representation, but it is not the same as the role played by an international legal consultant within the LCLs' own team.

34. There are also principled reasons why a given CPL (or team member) cannot play a role equivalent to a consultant. Any support provided by CPLs under Internal Rule 12*ter*(6) advances the interests of the particular civil parties. In practical terms a CPL may provide a suggested approach on a filing or position, or share the views of particular civil parties on a given issue.

[36] Annex G: Second OA Memo, para. 8.
[37] Annex G: Second OA Memo, para. 9.
[38] Annex D: Second ILCL Memo, para. 31.
[39] Annex G: Second OA Memo, para. 10.

However, that position would pertain to the specific clients of the CPL in question. Thus, even if an individual in one of the CPL teams was able and willing to assist regularly with tasks for the LCLs, a question would arise as to whether this swayed the LCLs towards the position of a certain sub-set of civil parties. A fair approach would require that an even distribution of CPLs played this role. The practical challenges of managing such a scenario, including in light of the practical factors which are dealt with in the following paragraphs, would be considerable.

35. Indeed, the OA overlooks that the task of coordinating does not save time in the way that delegation does. To the contrary, coordination *requires* time. Seeking the views of CPLs is an activity which itself uses the time of the LCLs. It requires preparing materials and communications to explain proposed approaches, chasing input via email and messaging applications, coordinating across time-zones and with multiple language staff to arrange on-line meetings where participants often struggle with interpretation, and subsequent internal discussions about how to resolve differing positions. It is obvious that this neutral coordination work could not be played by a CPL. But more significantly, the approach proposed by the OA, whereby core work of the LCLs is carried out by CPLs, would dramatically increase the amount of coordination which would have to be undertaken. Far from assisting with the significant workload of the LCLs, this approach would add to it.

36. The ILCL also provided the OA with a number of further practical reasons why the CPLs are not in a position to play the role currently undertaken by the international consultant, including their own lack of resources.[40] The Second OA Memo dismisses these practical considerations as irrelevant. It gives the question as whether there is an "insurmountable *inability* to render support services"[41] and states that the CPLs' "degree of funding is irrelevant to an assessment of the CPL's mandated role under the Internal Rules: CPLs bear the same responsibility to the Extraordinary Chambers and their clients irrespective of their level of remuneration."[42]

37. The approach demonstrated in these statements is artificial. It posits that because CPLs have been appointed, practical realities can be ignored. That is precisely the approach which human rights courts have rejected in holding that the right to legal representation must be effective and not

[40] Annex D: Second ILCL Memo, paras 32-34.
[41] Annex G: Second OA Memo, para. 10.
[42] Annex G: Second OA Memo, para. 11.

merely theoretical. In *Artico v Italy*, Italy argued that the appointment of a defence lawyer discharged its obligations. The European Court of Human Rights explained that:

> … the [European Convention on Human Rights] is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive ... As the Commission's Delegates correctly emphasised, Article 6 par. 3 (c) (art. 6-3-c) speaks of "assistance" and not of "nomination". Again, mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations. Adoption of the Government's restrictive interpretation would lead to results that are unreasonable and incompatible with both the wording of sub-paragraph (c) (art. 6-3-c) and the structure of Article 6 (art. 6) taken as a whole; in many instances free legal assistance might prove to be worthless.[43]

38. The OA is therefore wrong in several respects concerning the role of CPLs. First, they are wrong in asserting that a power exists *in law* for the LCLs to require work to be done for them by the CPLs. Secondly, they are wrong to disregard clearly relevant *practical factors* which show that CPLs cannot play the same role as an international consultant within the LCLs' team, and that attempting to rely on CPLs would only increase the workload and therefore resource requirements of the team.

B. Limitations of mandate or resourcing linked to judicial direction

39. The OA decision treats some tasks as outside the LCLs' mandate (or at least, not to be resourced[44]) because they are not linked to an explicit judicial proceeding or instruction. The point is made in two different ways:

(i) It is suggested that resources should not be provided for tasks which are "self-initiated or of an ongoing nature and without judicial deadline";[45] and

(ii) Secondly, the LCLs' role is said to be "confined to the 'conduct of proceedings' as supervised by the relevant Chamber"[46] or to "actual judicial work".[47]

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[43] ECtHR, *Artico v Italy*, App. No. 6694/74, Judgment, 13 May 1980, para. 33 (excerpt on case file at **F40/1.1.1.5**).
[44] It is not always clear which of these is the position taken. The First OA Memo treated reclassification work as within the Lead Co-Lawyers' mandate (para.6); but the Second OA Memo suggests that this does not warrant the provision of resources, in part because the work is "self-initiated" and has not been "requested from the parties by the Supreme Court Chamber at this time" (para. 15).
[45] Annex G: Second OA Memo, para. 15.
[46] Annex G: Second OA Memo, para. 25.
[47] Annex G: Second OA Memo, para. 26.

1) "Self-initiated" work

40. The OA appears to take the view that it should not resource work which is not explicitly and specifically ordered by a chamber (or, presumably, specifically and explicitly required by an Internal Rule other than Internal Rule 12*ter*).[48] Concerning reclassification, the OA states that it "is not informed of such work being requested from the parties by the Supreme Court Chamber at this time."[49]

41. The position is without legal basis and is deeply concerning in its consequences. It implies that resources will not be expended on litigation initiated by a party at the time which that party considers necessary. That is at odds with practice to date. And it would also severely limit the ability of counsel to provide effective representation.

42. At other tribunals, mechanisms exist for withholding legal aid fees where a chamber rules that filings initiated by counsel are "frivolous" or "an abuse of process".[50] That power is a sanction, exercised by judges, and is to be exercised "cautiously".[51] What the OA proposes goes well beyond that. It suggests that the OA could withhold resources in respect of *any* filings (or other work) which are initiated by counsel. It is difficult to conceive of how a lawyer could discharge ethical obligations to advance his or her clients' interests in such circumstances, since doing so often requires raising issues of which the Chamber would not be aware without a filing from the parties. This Chamber has recognised that;

> …it is the duty of lawyers for Civil Parties to protect the victims' interests and to bring to the attention of the appropriate chamber any violation or diminution of those legitimate interests.[52]

43. Moreover, since the Office of the Co-Prosecutor ("OCP") is unfettered by the constraints of hourly payments by the OA, such an approach would create a significant imbalance in the proceedings. The approach could also lead to delays if parties wait for an explicit order before raising a concern with the Chamber, even though they can see that certain work is necessary.

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[48] Annex G: Second OA Memo, para. 15.
[49] *Ibid*.
[50] See e.g., Rule 73(D), ICTY Rules of Procedure and Evidence; Rule 73(F), ICTR Rules of Procedure and Evidence; Rule 126(G), STL Rules of Procedure and Evidence; Rule 46(C), RSCSL Rules of Procedure and Evidence;
[51] ICTR, *Prosecutor v Kanyarukiga*, ICTR-2002-78-R11*bis*, Decision on Request to Admit Additional Evidence of 1 August 2008, 1 September 2008, para. 12.
[52] **Case 004/02 – E004/2/6** Decision on the Civil Party Lawyers' Request for Necessary Measures to be Taken by the Supreme Court Chamber to Safeguard the Civil Parties Fundamental Right to Legal Representation Before the Chamber in Case 004/2, 11 August 2020, para. 23.

44. The LCLs are unaware of any legal basis before this Court, or any practice of another international tribunal, which would support such an approach.

2) "Non-judicial" work

45. Additionally, the OA takes the position that the LCLs' mandate is limited to "judicial work".[53] This is said to support their decision not to resource "[w]ork related to the website, winding down/archiving and "legacy" (including responses to the Co-Rapporteurs)."[54]

46. The Court undertakes its work not only through filings, hearings and judicial decisions, but also through associated activities. These include providing public information and so-called "non-judicial" support for victims. However, drawing a stark line between judicial and non-judicial activities is artificial. The Court is a judicial institution. Holding a hearing is necessary to that mandate, but so is publicising the hearing and its outcome. Likewise, other functions necessary for hearings, filings and decisions are difficult to separate from that work: running a casefile database, managing a detention facility, or maintaining a court building could all to some extent be described as "judicial" work in that they are done to enable the parties and judges to make submissions and decisions. All are presumably considered necessary for the carrying out of the Court's mandate, or they would not receive funding.

47. Even if a distinction could be drawn between tasks closely related to "judicial" activity and others, the LCLs do not accept that their mandate is limited to the former. Taken to its logical conclusion such an approach would mean that the LCLs would not be remunerated for the time spent liaising with VSS on civil party matters or resolving administrative issues with sections of the OA such as IT, General Services, Travel, Human Resources or Security.

48. One area identified as "non-judicial" by the OA concerns the Court's residual functions and 'legacy'. The OA's work on this has involved, for example, input into the discussions between the Royal Government of Cambodia and the United Nations for a draft agreement concerning residual functions, approved by the General Assembly on 7 July 2021 ("Draft Agreement").[55] It also

[53] Annex G: Second OA Memo, paras 4, 25-26; See also Annex C: First OA Memo, paras 4, 7.
[54] Annex E: Email exchange between OA and ILCL, pp. 3-4 (Email from OA to ILCL, 1 October 2021). See also Annex G: Second OA Memo, paras 24-27.
[55] Draft Addendum to the Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea on the Transitional Arrangements and the Completion of Work of the Extraordinary Chambers, Annex to UN GA Resolution 75/257, A/RES/75/257 B, Resolution adopted by the General Assembly on 7 July 2021, Extraordinary Chambers in the Courts of Cambodia, residual functions.

involves discussions on the maintenance of and access to the ECCC's archives. These are matters of considerable interest to civil parties. Indeed, one of the Case 002/02 reparations projects seeks to increase access to public ECCC material.[56] Civil parties also have a concrete interest in ensuring that systems are in place to protect and sustain the Court's achievements, which is at the heart of discussions concerning "legacy".

49. On 1 September 2021 the Co-Rapporteurs published a call for ideas concerning residual functions in respect of victims.[57] It explained that and the Co-Rapporteurs are asked by the OA to report by 1 December 2021. The Co-Rapporteurs called for input for the purpose of creating that report. This initiative has significant and explicit relevance to civil parties.[58] Civil parties have some special interests in the way that the ECCC's residual functions concerning victims are undertaken. These include ensuring that steps taken do not undermine the value of reparations projects, and encouraging initiatives to continue and make sustainable the ongoing reparations projects (such as the role of the Legal Documentation Centre). Like all victims, civil parties have an interest in how any residual functions are undertaken – for example, in ways which respect their wishes, and their well-being and privacy – and an interest in being heard on these matters. The LCLs have made a formal submission to the Co-Rapporteurs.[59] However that submission could only be two pages long,[60] and there are significant other inputs which it is hoped will be provided by other means.

50. It is also likely to be of value to the Co-Rapporteurs (and thus the OA) for the LCLs to engage with this process. The LCLs are among the persons at the Court with particular knowledge relevant to this topic. Not only have they collected information from victims (that is, the civil parties) about what initiatives from the Court they would value, the LCLs (and especially their international

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[56] **E465** Trial Judgment, paras 4429, 4461 ("The Chamber agrees with the Lead Co-Lawyers that satisfaction as reparation includes 'the verification of facts and full and public disclosure of the truth, commemorations and tribute to victims, and the inclusion of an accurate account of violations that occurred in educational materials at all levels."); **E457/6/2/1** Civil Party Lead Co-Lawyers' Final Claim for Reparation in Case 002/02, 30 May 2017, paras 47-49.

[57] Annex B: Call for Contributions of Ideas of the Extraordinary Chambers in the Courts of Cambodia (ECCC) Residual Functions Related to Victims.

[58] The Co-Rapporteurs make clear that their mandate is not limited to civil parties, but includes all victims. Nonetheless, all civil parties are victims, even if not all victims are civil parties. The Co-Rapporteurs specifically ask for contributions "explaining how the proposed initiatives would be meaningful and of lasting assistance for *civil parties*, victims of the Khmer Rouge regime, and the general public") (*emphasis added*).

[59] Annex I: CPLCLS Submission to Co-Rapporteurs on Residual Functions related to Victims, 5 October 2021.

[60] Annex B: Call for Contributions of Ideas of the Extraordinary Chambers in the Courts of Cambodia (ECCC) Residual Functions Related to Victims ("Contributions should contain: a broad outline (not exceeding (2) pages in English and/or three (3) pages in Khmer)…").

consultant) have also been at the centre of the reparations process and have insights from it which are applicable here.

51. Another "non-judicial" activity of the OA is the provision of public information about the Court via its website. The website includes general information about the ECCC, but also information on specific subjects, including civil parties. Since 2019 the LCLs have planned to update and deepen this information, so that people understand the civil party role and are able to access information about civil parties' contribution to the ECCC.

52. The Lead Co Lawyers note that all of these are activities *of the ECCC*. All directly impact the interests of civil parties regarding the ECCC. The LCLs therefore consider that it falls within their mandate to engage with the Court on these issues. The contrary position would mean that it was not part of the parties' work to engage with any OA action not involving a filing or a hearing, even where the actions of the OA affect the substantive rights of the parties. The LCLs would be unresourced and unremunerated for steps such as: regular coordination with VSS, correcting reporting of Public Affairs statements;[61] advocacy relating to the management of archival material concerning their clients (including even their clients' access to material concerning them); and carrying out everyday interactions with OA personnel on offices, IT equipment, transport etc.

53. Such an approach is obviously artificial. The parties regularly engage with the "non-judicial" aspects of the OA's work. Indeed, we are asked to do so *by the OA*: for example through participation in press-conferences, or contributions to budget submissions and quarterly reports. The OA explicitly sought the input of the LCLs (among others) to assist it mapping ECCC documents for legacy purposes.[62] That approach is absolutely correct. Certain steps to be taken by the OA concern the civil parties and they should be represented on those matters.

54. The Second OA Memo deals with this contradiction in its position by distinguishing work which is requested by the OA from other work. The former is said to be remunerable; the latter not. This ignores that the essence of the LCLs' work is legal representation, and thus the advancement of the civil parties' interests rather than those of the OA. Work must be remunerable based on whether it is necessary and appropriate for effective civil party representation, regardless of

[61] A step which was taken recently by the International Co-Prosecutor: Annex J: See Press Release by the International Co-Prosecutor, 8 September 2021.
[62] Annex K: Memorandum from OA, Mapping of documents held by ECCC Sections, 20 September 2019.

whether it requested or considered desirable by the OA. This is required by the autonomy of the LCLs provided for in Internal Rule 12 and by general principles of independence of counsel.[63]

55. The LCLs note that a recognition that certain activities fall within their mandate does not entail the conclusion that such activities must be funded limitlessly. The OA may still identify how much work is necessary and appropriate for effective representation. However the OA may not refuse all resourcing for such work by wrongly limiting the LCLs' mandate.

C. Nature of lawyers' ethical obligations and relationship to resourcing

56. The OA also attempts to narrow the scope of the LCLs' mandate by arguing that (i) they do not owe lawyer-client duties to the civil parties; and (ii) even if they did, complying with such obligations is discretionary rather than essential and therefore not required to be resourced by the OA. Both arguments are wrong.

1) The relationship of lawyer-client exists between LCLs and civil parties

57. The OA says that the civil parties are not "clients" of the LCLs, [64] apparently so as to take the position that LCLs do not owe ethical obligations to the civil parties.[65] The point is important because the OA's position is used to make the argument that certain activities are not professionally required of the LCLs and therefore needn't be resourced.

58. The scheme for civil party representation at the ECCC is *sui generis* and developed during the course of the Court's work. Initially, civil parties were represented only by CPLs. Civil parties' right to effective legal representation was implemented solely through CPLs. In February 2010 amendments to the Internal Rules introduced the current system of two-tier legal representation. The changes were said to be motivated by the likely number of civil parties in Case 002, and the need to "streamline" participation.[66]

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[63] See for example Article 5, Code of Ethics for Lawyers of the Bar Association of the Kingdom of Cambodia (excerpt on case file at **E314/5/1.1.1**); IBA, International Principles on Conduct of the Legal Profession, principle 1 *[Attachment 1]*.

[64] Annex G: Second OA Memo, para. 22. It is stated: "the Office of Administration does not accept the view that the civil parties are, *as a starting point*, clients of the LCLs." [emphasis original] The LCLs have not understood the reference to a "starting point".

[65] The point is made in reference to sections of the Second ILCL Memo which address professional obligations owed to civil parties by the LCLs. Annex G: Second OA Memo, para. 22, and footnote 51, which refers to Annex D: Second ILCL Memo, paras 2, 7-9 and 30.

[66] Annex L: ECCC Press Release, 7th Plenary Session of the ECCC Concludes, 9 February 2010. See also **E313** Case 002/01 Judgment, 7 August 2014, paras 1109-1110.

59. Importantly, these amendments were specifically stated as being intended to "enhance the quality of Civil Party representation".[67] It must therefore be understood that the amendments would not diminish the right of civil parties to effective legal representation. It would be odd if the plenary sought to "enhance" representation by introducing an umbrella structure of lead lawyers *who did not owe the same ethical duties to the civil parties*. If that was the case, civil parties could no longer rely on case strategy, filings and advocacy being undertaken in their best interests; nor that lawyers making decisions on their behalf owed them duties of confidentiality. To have a decision-making role in civil party representation played by lawyers who did not owe such duties would fundamentally undermine civil parties' right to effective representation. It would also undermine the "balance between the rights of the parties", since suspects and accused persons *are* entitled to lead counsel who owe them such obligations.[68]

60. The LCLs therefore consider that, especially when read in context, "[r]epresenting the interests of the consolidated group of Civil Parties"[69] and "ensur[ing] the effective organization of Civil Party representation"[70] in the Internal Rules refers to a relationship of legal representation between the LCLs and civil parties. The Trial Chamber also took the view that the civil parties are *represented by* the LCLs.[71]

61. The conclusion that LCLs have a relationship of legal representation with the civil parties, and owe them ethical duties, is not undermined by the fact that the Court's legal framework also includes a role for CPLs. Divided systems of legal representation are not unknown,[72] and in these systems both categories of lawyer are engaged in the legal representation of the client, and both owe professional duties to that client.

2) Compliance with ethical obligations as mandatory and part of effective representation

62. The ILCL's resource requests estimated workload taking into account activities required for complying with professional obligations. The Second OA Memo takes the position that:

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[67] *Ibid*.
[68] Internal Rule 21(1)(a).
[69] Internal Rule 12 *ter* (5)(a). See also Internal Rule 23(3).
[70] Internal Rule 12 *ter* (1).
[71] **E74** Trial Chamber Memorandum, Trial Chamber response to Motions E67, E57, E56, E58, E23, E59, E20, E33, E71 and E73 following Trial Management Meeting of 5 April 2011, 8 April 2011, p. 2.
[72] See for example the role of barrister in the Anglo tradition, who typically receives power to act through a solicitor who holds a power of attorney for the client. This division of roles within legal representation exists in a number of Commonwealth jurisdictions, including in the UK, Ireland, Australia, New Zealand, South Africa, Hong Kong.

> If the LCLs are of the view that certain work is necessary as a result of their professional obligations to their Office, the civil parties, the CPLs or the Extraordinary Chambers, they undertake such actions at their own discretion. However *payment* for such activities is not possible if the activities fall outside the remit of their designations, as legislated by the Plenary. [emphasis original][73]

63. The position ignores that many of the ethical obligations in question are also an explicit part of the ECCC's legal framework. The example referred to by the OA is the ILCL's reference to obligations of confidentiality.[74] That obligation is also contained in Internal Rule 22(3), and as such has been very explicitly "legislated by the Plenary".

64. But more fundamentally, the LCLs are concerned by the misunderstanding of their role. Fulfilling all professional obligations as a legal representative to the civil parties *is* the remit of the LCLs. Civil parties' right to effective representation would become illusory if some of the professional guarantees designed to make representation effective were simply not considered part of the work of lawyers representing civil parties.

65. Therefore, certain tasks (such planning archiving and wind-down activities so as to ensure the confidentiality of civil party material pursuant to principles of privilege or professional secrecy) fall within the mandate because they are necessary for ethical and effective professional representation. The same is true of management and retention of files (and therefore ensuring proper handover of records by outgoing team members).

D. Effect of these errors on civil party rights

66. The errors explained above have led the OA to diminish the volume of work to be undertaken on behalf of the civil parties, while simultaneously overestimating the available resources (by assuming the ability to demand and supervise input from the CPLs). Through these errors it has concluded – incorrectly – that the workload of the LCLs can be undertaken with a reduced team, and without the retained memory of the team's international consultant. That is not the case, for reasons which are further elaborated below.

VII. REFUSAL OF NECESSARY RESOURCES WITHOUT REASON

67. The LCLs maintain that the resources requested are necessary and appropriate for the effective representation of the civil parties. Although the OA may believe that workload automatically diminishes at the present stage of proceedings, that cannot be assumed to be the case

[73] Annex G: Second OA Memo, para. 28.
[74] Annex G: Second OA Memo, footnote 62, referring to Annex D: Second ILCL Memo, para. 24.

for all parties. The LCLs' workload remains considerable. In addition to the matters detailed above, several other significant pieces of work need to be carried out during 2021 and 2022, which the OA appears to accept as falling within the LCLs' mandate. These include: (i) meetings with as many as possible of the 3865 civil parties or their surviving family members, scheduled to begin on 29 October 2021;[75] (ii) a review of the casefile material concerning civil parties and submissions concerning the reclassification of those materials; (iii) collecting and collating information on the implementation of reparations projects in order to report to the Chamber.[76] Reducing the Section's mandate and resources has real and consequential effects on the civil parties' right to effective representation. This work cannot be carried out without the continued involvement of an international consultant.

68. More information on the tasks involved is contained in the First ILCL Memo[77] and will not be repeated. However in light of the Second OA Memo certain points are made.

(i) The work is voluminous. There is more work than can be done by one person on the international side. There is more work overall than can be done by four people. This is so, even allowing an extended time frame for the work. The goal is to have all tasks completed before the final judgment. This cannot be done without an international consultant.

(ii) The tasks require a variety of skills. These include: strategy, legal analysis, drafting, proofreading, English/Khmer/French language skills, information management, research, donor liaison, local partner coordination, CPL coordination, logistics, and others. Different team members have different skills. This is why having two persons working part time will often be more effective than having one person working full time.

(iii) The tasks likewise are appropriate for team members of varying levels of seniority. Maximum efficiency and the responsible expenditure of public funds militate towards

[75] The LCLs and the VSS have been working together for months in order to secure external funding to meet civil parties and discuss key questions with them, including providing updates about the appeal and seeking views on the fate of sensitive personal information about civil parties which is contained in the casefile. Funding has been secured and the LCLs are coordinating 13 missions for 8 CPLs to meet with 260 civil parties from 29 October to 31 December 2021. The LCL Section oversees these missions, prepares the substantive information to convey to civil parties, and consolidates the results of the consultations in order to determine any strategy going forward.

[76] Reporting of this kind was undertaken in Case 002/01. **E218/7/9** Civil Party Lead Co-Lawyers' Submission on the Implementation of Judicial Reparation Awards for Case 002/01, 1 March 2017; **E218/7/10** Memorandum from the Civil Party Lead Co-Lawyers to Judge NIL Nonn, President of the Trial Chamber, and the Judges of the Trial Chamber regarding Case 002/01 Reparation Update, Project 1: National Remembrance Day and Project 3: Construction of a memorial in Phnom Penh to honor the victims of forced evacuations, 8 May 2018.

[77] Annex A: First ILCL Memo, pp. 2-7; Annex F: Third ILCL Memo, pp. 2-3.

ensuring that more junior tasks are not performed by a senior team member, and thus that team members at multiple levels (both Khmer and English speaking) are retained.

69. The LCLs assessment of the resources required for this work is a conservative one. They have sought to make a proposal which could be acceptable to the OA, even if this means that the work may take some time. In fact, owing to consistent resources shortages, the LCLs have had difficulties implementing some parts of their mandate while carrying out work in the appeal process.[78] That work had to wait until the appeals proceedings were completed. The LCLs have now proposed to undertake that work while the judgment is pending. However without a consultant on the international side, the LCLs cannot achieve this.

70. The LCLs also consider it necessary to react to certain errors in the OA's reasoning concerning the resources necessary to deal with this workload:

A. National side resources

71. The OA is wrong to suggest that any resource shortfall is resolved by the involvement of the national side. The OA implies that the national members of the LCLs' team are ignored by the ILCL's resource requests because they are "not referred to in [her] communications."[79] That is incorrect. The national side resources are not ignored, they are assumed. This quarter's ILCL request, as with all requests before it, was made to UNAKRT strictly in respect of the resources required on the international side, on the assumption that the national side remains unchanged.

72. While the national side team plays an indispensable part in the LCLs' team, that does not displace the need for an international consultant. That is in part because of the volume of the workload, which requires multiple team members. It is also because of the range of skills required, as explained above.

B. Comparisons with the OCP

73. The LCLs note the OA's statement that reference to the work or resources of the OCP is "unhelpful".[80] The LCLs disagree. Of course, the resources of the OCP are not determinative, since the OCP and LCLs have different tasks. For example: the OCP does not need to undertake external fundraising, or attempt to coordinate meetings with thousands of people. However this does not

[78] This appears to have been accepted by the OA: Annex C: First OA Memo, para. 5.
[79] Annex G: Second OA Memo, para. 8.
[80] Annex G: Second OA Memo, para. 12.

mean that the resourcing and work of the OCP is of no relevance. Internal Rule 21(1) requires that a balance is maintained between the parties. If one party is provided with resources to undertake a particular task (for example, reclassification or archiving and wind-down[81]) but the other parties are refused resources for those tasks, a question arises regarding that balance. Moreover, where certain tasks are common to both the OCP and the LCLs (or, for that matter, to the Defence), or at least very similar, a reasonable decision maker may view that as an indicator that similar levels of resourcing are required for those tasks.

C. The "co-principals" concept

74. The OA's reliance on the concept of "co-principals" is ill-founded. The fact that appointing two LCLs is mandatory does not in itself determine anything about the resources which they are to be allocated. It is not a reason for denying support staff, particular in light of Internal Rules 12*ter*(4) ("supported by such other staff as necessary") and Internal Rule 12 (requiring the establishment of a Section for the LCLs). Neither is it a reason for insisting that *all* work must be done by the LCLs, or that the LCLs should work full time. If that were the case it is unclear why consultants have been provided to date, or why the current ILCL has been paid on an hourly basis since her appointment. It is also noteworthy that the Defence Legal Assistance Scheme explicitly recognises that Co-Lawyers may not always work full time.[82]

D. Institutional memory

75. Delays caused through the loss of key team members have beset international criminal tribunals because of the size of cases and the period of time required to become familiar with them, and this problem can become more marked towards the end of a Court's work.[83] Other international courts have dealt with this problem in defence and victims' teams by allowing counsel greater flexibility in the allocation of resources.[84]

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[81] This was the point of the ILCL's reference to the OCP. See Annex D: Second ILCL Memo, para. 25.
[82] Annex H: ECCC Legal Assistance Scheme (Amended December 2014), Part A, third bullet point.
[83] See for example comments about delays caused by this problem in Assessment and report of Judge Theodor Meron, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004) covering the period from 16 May 2015 to 16 November 2015, S/2015/874, 16 November 2015, paras 15, 17.
[84] See for example: ICC, Consultation Meeting on Legal Aid Policy, p. 50 lines 8-12, 3 December 2018,

76. The ILCLs resource requests repeatedly addressed the need to protect the institutional memory held by the LCL's international consultant.[85] Certain work – such as dealing with reparations projects, research and Casemap management – has been primarily undertaken by her.

77. The LCLs are certain that the loss of the international consultant will considerably slow their work, particularly in relation to reparations reporting, declassification and civil party engagement on all of which her extensive experience is a huge asset. The OA deals with this by simply asserting that "institutional memory is a product of *all* personnel, not select individuals,"[86] a generalised statement which ignores the specific case at hand. The LCLs team is a small one, and there is no other person in it who shares the particular knowledge and skill set which our consultant has. The LCLs do what they can to preserve memory through records, but some knowledge will always be retained by individuals who can quickly associate current work with previous work product to use resources more efficiently. In disregarding this, the OA has ignored a relevant consideration. While the LCL's understand that reducing personnel may at some point become necessary, the OA has not explained why this harm to team memory needs to be done if the consultant can be retained at no additional cost (see below).

E. The likelihood of delays

78. Certain work, if not done now, will nonetheless need to be completed, even potentially after the Chamber's final judgment. Delaying this work risks prolonging the lifespan of the Court and its residual functions beyond the three years envisaged by the Draft Agreement.

79. Judges of the Court have considered such matters as relevant to the resourcing of parties' teams. For example, when deciding a request for resources for a Case 004 defence team, the International CIJ explained:

> …I recall that charged persons at the ECCC have a fundamental right to adequate time to prepare their defence. At the same time, they have a fundamental right to be tried within a reasonable time. The resources available to the Defence bear directly on these rights and, consequently, on the duration of the investigation. The longer the investigation, the greater the expense for the ECCC and the donor states. Measures capable of shortening the time required by the Defence to participate in the judicial investigations, therefore, are not only in the interests of Yim Tith, but also of the ECCC and the international community as a whole.[87]

[85] Annex A: First ILCL Memo, p. 7; Annex D: Second ILCL Memo, paras 28(a), 34; Annex F: Third ILCL Memo, p. 3.
[86] Annex G: Second OA Memo, para. 14.
[87] **Case 004 – D312/1** Decision on YIM Tith's Urgent Request Concerning Defence's Resources, 7 June 2016, para. 5.

80. An equivalent question now arises regarding the considerable work involved in identifying civil party information which should not be made public (reclassification). This will need to be done at some stage – if not now, then after the Case 002/02 final judgment. The LCLs therefore consider that there is a significant benefit to be gained by conducting this work now, while the issues are fresh in memory, and while the LCLs have a consultant familiar with the issues.

81. The OA's decision would slow the LCLs' work by (i) substantially reducing their overall available human resources; and (ii) causing the loss of institutional memory referred to above. Even if consultancy resources are made available again in the future (as proposed by the OA[88]) this will not fully address the harm caused. The process of becoming familiar with Case 002, civil party information, and the workings of the Court itself requires a considerable time.

F. Inefficient approach to allocation of work

82. As the ILCL's memos explained, her proposed division of work would allow less complex or strategic tasks to be undertaken at lower cost.[89] Requiring that *all* work on the international side is done by the ILCL rather than a consultant remunerated at 50% of ILCL's rate of pay would undermine the proper administration of public funds rather than advancing it.[90] It would mean that many basic tasks, especially when needing to be done in English, would have to be undertaken by the most expensive member of the LCL team. Such tasks include: Zylab searches, retrieving information from or inputting information into the internal client database, organising and reviewing thousands of documents for sensitive material relevant to reclassification procedures, coordinating with CPLs and VSS on logistics and working-level matters, collating large volumes of information received through civil party meetings, legal research, proof reading documents, preparing tables of authorities and lists of attachments for filings, coordinating and following up with project partners, and submitting documents for filing or translation.

83. The LCLs note that on the defence side, the Legal Assistance Scheme explicitly *prohibits* certain tasks from being undertaken by a Co-Lawyer, and mandates that they should be carried out by a legal consultant or case manager. Those tasks include: legal research, preliminary review of evidence, organising files, requests for translation, use of Zylab and Casemap, scanning documents

[88] Annex E: Email exchange between OA and ILCL, pp. 3-4 (Email from OA to ILCL, 1 October 2021); Annex G: Second OA Memo, para. 30.
[89] Annex D: Second ILCL Memo, para. 28(b); Annex F: Third ILCL Memo, p. 3.
[90] See Annex G: Second OA Memo, paras 23, 28, which reference the importance of due diligence in the administration of public funds.

and administrative tasks.[91] No reason has been given why the same approach should not apply on to the civil parties' legal representation.

G. Cost-neutrality

84. The LCLs appreciate that all of the above factors must, to some extent, be weighed against budgetary considerations, given that funds are necessarily limited. However in this instance the OA is taking a resource decision which is contrary to the requests of independent counsel, which will cause the loss of human resources and institutional memory, and almost certainly lead to delays and extra costs, *even though the ILCL has proposed cost-neutral solutions*.

85. The ILCL proposed solutions would increase the available resources of the team at no additional cost. This would be done by having a greater share of the work undertaken by the team's consultant, with less of undertaken by the ILCL (whose rate of pay is higher).[92] Or it could be done by changing the ILCL's contractual arrangements so that she is provided a monthly amount and is free to subcontract the work.[93] This solution would also ensure that more junior tasks are not being carried out at a disproportional cost to the Court (see above at paragraphs 82-83).

86. It has been held previously that the OA should not reject requests for resources that are without a financial impact on the Court, unless they contravene a specific and overriding rule:

> Requests for resources by a defence team that come at no expense to the ECCC, therefore, should only be denied if they are in violation of a specific rule which his of equal importance with the fundamental rights that would be fostered and protected by the provision of cost-free resources.[94]

87. In the present instance the OA has taken a decision which will cause clear harm to the representation of civil parties, and which has no known financial benefit. No explanation has been provided as to why the cost-neutral solutions proposed by the LCLs could not be adopted.

88. The LCLs submit that the matters set out in Sections VII A to G demonstrate that in reaching its decision the OA took into account irrelevant considerations, ignored relevant considerations, and reached a decision which no reasonable decision-maker could have reached. On these bases the decision should be quashed.

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[91] Annex H: ECCC Legal Assistance Scheme (Amended December 2014), paras E(8) and E(9).
[92] Annex F: Third ILCL Memo, p. 3.
[93] Annex F: Third ILCL Memo, p. 4.
[94] **Case 004 – D312/1** Decision on YIM Tith's Urgent Request Concerning Defence's Resources, 7 June 2016, para. 7.

VIII. LEGITIMATE EXPECTATIONS: UNEXPLAINED CHANGE OF APPROACH AND RENEGING ON UNDERTAKINGS BY THE OA

89. Prior to the First OA Memo, on 23 September, the LCLs had understood that the ILCL's resource request would be granted, although perhaps with a reduction in the cap for the ILCL's hours. That expectation was based on two factors:

(i) the approach previously taken to all previous resourcing requests, many of which were materially similar; and

(ii) express undertakings made by officials of the OA, on which the LCLs relied.

90. UNAKRT requires the ILCL to submit a resource request each quarter. Many tasks have recurred in the ILCL's resourcing requests, because in the absence of sufficient resources these tasks have taken significant time to complete. For example, reporting on reparations implementation has been part of the LCLs' resourcing requests and action plans since 2019, as have plans to update civil party website information. It has been impossible to complete this work because of resource shortages. Reclassification and legacy work have each been included in multiple ILCL action plans since January 2021 and August 2020 respectively. Despite this, it has never previously been said that those tasks fell outside the LCLs' mandate. Nor has payment been refused to the ILCL for time spent on those tasks.

91. Additionally, many of the rationales now given by the OA for its decision have never been raised before. It has never previously been said that the LCLs should delegate work to the CPLs. Neither has it been said that it is unnecessary for UNAKRT to provide consulting resources because the LCLs can simply rely on resources from the national side.

92. The LCLs accept that there are limits to the extent to which past practice can be used to predict future behaviour. If circumstances materially change, that would warrant a change in approach. However no material change in circumstances has been identified.

93. Moreover, the absence of any applicable framework has made it unavoidable for the LCLs to rely on observed practice as an indicator of what they can expect from the OA. Unlike defence counsel, who have a Legal Service Contract, a Legal Assistance Scheme, and DSS Regulations, the LCLs have no contract or administrative document which regulates the resources to be provided

to their teams.[95] Additionally, decisions are routinely provided verbally or by brief email without reasons. This is despite explicit and repeated requests from the ILCL for written reasons which, it was thought, would provide guidance regarding future decisions.[96] Unfortunately, this has resulted in a situation whereby the LCLs must rely on practice (and promises) and the expectation that the OA will behave consistently over time.

94. In this instance, the LCLs relied not only on the practice to date, but also on two explicit promises made by the OA regarding future resourcing of the international side.

95. First, following repeated requests by the ILCL for consultancy resources to be provided at a more senior level with higher remuneration, in mid-January 2021 the OA offered the ILCL a choice: The OA would agree to provide an international consultancy position at a more senior level and higher rate of pay, but it would run only until the appeal hearing and thereafter be terminated. Or alternatively, the ILCL could opt to retain her core international consultancy position at its current level and rate of pay, in which case *the consultancy position would be continued after the appeal hearing*. It was discussed that on the latter option, the consultancy position may be reduced to part-time after the appeal hearing, but this would be determined by reference to work requirements at that time.[97]

96. Following this offer, the ILCL requested a meeting with the UNAKRT Coordinator. It was held over Zoom on 25 January. During that meeting the Coordinator reiterated the offer. He also undertook that if the ILCL opted to maintain a consultant, albeit at the lower level, then following the hearing, once resource reduction was demanded, it would be up to the ILCL to decide how hours should be distributed between her and the core consultant, within the budgetary confines set

[95] The ILCL is provided with standard UN consultancy contracts, using general terms, which are usually between one and three months in duration.

[96] Requests for reasons to be given for any adverse decision were explicitly included in resourcing request memos sent to the OA on 26 March 2021, 6 May 2021 and 21 June 2021. On 14 May 2021, the ILCL wrote to the OA: "I would like to repeat my request that when my resourcing requests are refused, whether in whole or in part, I should be provided with written reasons for that decision. This is not merely a matter of courtesy to me given that I have had to provide reasons for my request. If I had an understanding of the Office of Administration's reasoning this would usefully inform future requests. And while I would also clearly need written reasons in order to seek the Chamber's review of your decisions, I also believe that I am less likely to require such a review if I am aware of reasonable justifications for a request having been denied." See Annex M: Email from ILCL to OA, Resources for appeal hearing, 14 May 2021. No response was received.

[97] This decision was communicated orally in the first instance, which is common practice by the OA. However confirmation can be seen in the OA's response to a summary of the discussion sent by the ILCL. See f: Email from OA to ILCL, 18 January 2021. The matter was subsequently dealt with explicitly in the next ILCL resourcing request: Annex O: Memo from ILCL to OA, Re: Resources for Civil Party Lead Co-Lawyers' Section – April to June 2021, 26 March 2021, p.5.

by the OA. This matter was discussed in some detail, because the ILCL reiterated the importance to her team of maintaining an international consultant. The clear promise made was that if the budget needed to be reduced, the ILCL could retain the consultant by reducing the ILCL's hours instead. While the promise was made verbally (as is the practice of the OA), the ILCL made reference to it in subsequent resourcing requests in order to ensure that a record existed.[98] No response was ever given from the OA to challenge the position as set out in the ILCL's memos. The LCLs note that the Second OA Memo appears to recognise that the undertaking was made, although it gives that undertaking a perverse meaning. ("[Y]ou were indeed informed that resources approved for your Section could be distributed in any way which was operationally convenient. However, you were also informed that the requested resources must be fully justified."[99]) It is unclear how the resources which have been approved for the ILCL could be "distributed in any way which [is] operationally convenient", since the OA has explicitly decided that they will be provided only for the ILCL's work and no consultant has been approved. The OA has explicitly rejected the ILCL's proposals for other options to share this money with a consultant in order to retain essential consulting resources. It is noteworthy that, while refusing consulting resources, the OA granted the ILCL *more* hours than she requested for herself this quarter. It remains unclear, and unexplained, why the money for those additional hours could not be used for a consultant.

97. The LCLs relied on these promises. The ILCL rejected the offer for a more senior consultancy, precisely so that she could rely on consulting resources being continued after the appeal hearing. In a memorandum sent on 26 March 2021 she explained:

> In my last three quarterly memos, of June, September and December 2020, I requested that the Section's P-3 equivalent consultant be replaced with a P-4 equivalent consultant. I was initially informed these requests could not be approved because of a hiring freeze within the UN. Following my last memo I was informed that should I persist with this request, it could now be considered, at least in respect of the limited period until the appeal hearing.
>
> However I was informed that the request would be considered only on the basis that it would result in the total cessation of my consultancy resources after the appeal hearing, regardless of what work was required from the section post-hearing. In contrast, I was reassured that should I withdraw the P-4 request, I would be permitted to maintain consulting resources after the appeal hearing, and that

[98] Annex P: Memo from ILCL to OA, Re: Resources for Civil Party Lead Co-Lawyers' Section – July to September 2021, 21 June 2021, p. 5: "I anticipate that at some point following the appeal hearing, the Office of Administration will wish to reduce at least some of the Section's resources to part-time work, to reflect a reduction in litigation work until delivery of the final judgment from the SCC. I have previously been assured that when this occurs, I will be accorded flexibility in determining the manner in which available resources will be allocated as between myself and my international legal consultant. As previously indicated, I anticipate requesting that the international legal consultant post remain full time, while my hours may be reduced when that is appropriate in light of our workload."

[99] Annex G: Second OA Memo, para. 17.

> I would be given flexibility (within reason) to determine what the division of "hours"/ workload between the consultant and me would be at that time. *Since I do not consider it possible for the Section to fulfil its mandate after the hearing without any consultancy resources, this has left me with no choice but to withdraw the request.*[100] [emphasis added]

98. The OA was therefore aware that the ILCL was acting in reliance on its promise precisely in order to ensure that consulting resources essential for the LCLs' work would be continued after the appeal hearing. Elsewhere the memo set out the tasks needing to be done after the hearing, and the fact that they had accumulated due to a shortage of resources and a need to focus on the appeal proceedings.[101]

99. More generally, the LCLs planned and prioritised their work in reliance on the two promises which had made clear that international consulting resources would be continued. They did not prioritise tasks which the international consultant is uniquely placed to undertake. Nor did they task the consultant with reviewing her emails and papers over nearly seven years of work to save key information or preparing a detailed handover note on matters within her exclusive knowledge. Those tasks will be impossible to complete during October.

100. Despite two written indications by the ILCL, in March and June 2021, that she expected the promises would be honoured,[102] the first sign of the OA's intention to renege was received in the First OA Memo on 23 September, followed by the emailed decision of 1 October. Attempts to seek clarification of the email, to determine whether termination of the consultant was intended, were not responded to.[103] The result is that the LCLs, and the consultant herself, have been left with just short of three weeks in which to attempt a handover and arrange the consultant's separation after seven years of service at the ECCC.

101. The LCLs note that in international administrative law a decision-maker can bind him- or herself through the creation of an of legitimate expectation in another:

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[100] Annex O: Memo from ILCL to OA, Re: Resources for Civil Party Lead Co-Lawyer' Section – April to June 2021, 26 March 2021, p. 5.
[101] *Ibid*., p. 6: "In June 2021, the Section will have a sizeable load of work that has had to be put on hold during hearing preparation. This particularly includes (i) finalizing remaining filings, which are likely to involve a significant amount of work; (ii) coordinating civil party engagements; (iii) legacy inputs and website update."
[102] *Ibid*., pp. 5-6; Annex P: Memo from ILCL to OA, Re: Resources for Civil Party Lead Co-Lawyers' Section – July to September 2021, 21 June 2021, p. 5.
[103] Annex E: Email exchange between OA and ILCL, pp. 1-3 (Emails from ILCL to OA, 2 October, 4 October, 6 October 2021).

> A legitimate expectation giving rise to contractual or legal obligations occurs where a party acts in such a way by representation by deeds or words, that is intended or is reasonably likely to induce the other party to act in some way in reliance upon that representation and that the other party does so.[104]

102. A legitimate expectation can arise either from "the application of a regular practice or through an express promise."[105]

103. Before the UN Dispute Tribunal a promise should usually be in writing in order to give rise to a legitimate expectation, but verbal promises constituting a "firm commitment" can suffice.[106] Before other fora it well established that a verbal promise can suffice.[107] In any event in this context both undertakings were subsequently reflected in written correspondence.

104. While frequently arising in international administrative cases concerning staff contractual disputes, the principle of legitimate expectations is not restricted to that context. It is found in various domestic and international bodies of law.[108] It has been applied by the ICTR to an accused person's legitimate expectation regarding the assignment of counsel.[109] The concept is related to other reliance-based doctrines such as promissory estoppel, but arises where the expectation originates from a public authority, and is broader insofar as it not only includes expectations based on explicit promises, but also those arising from consistent practice.[110]

105. The LCLs submit that this concept is applicable in the present case. Firm, specific and unequivocal promises were made by the OA to the ILCL. The LCLs relied on those promises. The OA was explicitly made aware of that reliance. Detriment would follow if the OA is permitted to

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[104] UNDT, Case No. UNDT/NY/2009/051/JAB/2008/098, *Sina v Secretary-General of the United Nations*, Judgment, Judgment No. UNDT/2010/060, 9 April 2010, para. 35

[105] UNDT, Case No. UNDT/NY/2011/073, *Candusso v Secretary-General of the United Nations*, Judgment, Judgment No. UNDT/2013/090, 26 June 2013, para. 39.

[106] UNDT, Case No. UNDT/NBI/2010/09/ UNAT/1582, *Bowen v Secretary-General of the United Nations*, Judgment, Judgment No. UNDT/2010/197, para. 51. ("Whether a staff member has a legitimate expectation will depend on whether it can be established that anything was said or done by the administration which amounted to a firm commitment to renew the contract so that in spite of the wording of his contract a staff member could reasonably have expected an extension. A verbal statement by a supervisor indicating that an appointment will be extended beyond the expressly stated expiry date is, for example, an act which would give a staff member a legitimate expectation that his or her contract will be renewed.").

[107] See eg: ILO Administrative Tribunal, *In re Geiser*, Judgment No. 782 (1986), para.1: "It does not matter what form the promise takes: it may be written or oral, express or implied. He who makes it is bound to keep faith, even if he made it orally, or if it is to be inferred merely from the circumstances or his behaviour"

[108] See L. Otis and J. Boulanger-Bonnelly, "The Protection of Legitimate Expectations in Global Administrative Law" in G. P. Politakis, T. Kohiyama and T. Lieby (eds), LO100 - Law for Social Justice (Geneva: International Labour Office, 2019) 395 *[Attachment 2]*.

[109] ICTR, *Akayesu v Prosecutor*, ICTR-96-4-A, Decision Relating to the Assignment of Counsel, 27 July 1999, p. 3.

[110] A discussion of the relationship between these concepts can be found in the Indian Supreme Court's Judgment in *The State of Jharkhand and Ors v Brahmputra Metallics Ltd., Ranchi and Anr.* 6 The State of Jharkhand and Ors. v. Brahmaputra Metallics Ltd. And Ors., 2021 (1) SCJ 131, paras 32-35 *[Attachment 3]*.

renege. The LCLs will have lost the chance to use their consultant for certain tasks during the period they had her because they had understood that her post would be continued.

106. The position is made even clearer by the fact that the OA's breaking of these promises coincides with a material deviation from previous resourcing decisions in terms of the tasks considered to fall within the LCLs mandate and approach to determining resourcing. The LCLs were entitled to expect that tasks which fell within mandate would continue to fall within mandate now. They were entitled to expect that the OA's understanding of the relationship between the LCLs and CPLs would remain unchanged.

107. The OA's decision should therefore be overturned as contrary to the legitimate expectations of the LCLs based on both practice and express promises. The OA should be required to implement its promises to (a) allow consulting resources to be continued; and (b) allow the LCLs to determine the division of available resources between the ILCL and the consultant.

108. To minimise such difficulties in the future, the Chamber may consider directing the OA to establish Legal Service Contracts and a Legal Assistance Scheme for the LCLs similar to those in place for defence counsel. Although the Court may be nearing the end of its work, that is not a reason to continue practices which encourage inconsistent and unaccountable decision-making. The lack of transparent and predictable systems can still contribute to disputes and cause delays and additional costs, even during the remaining period of the Court and its residual functions.

IX. RELIEF SOUGHT

109. For all the reasons set out above, the LCLs request the Chamber to clarify the mandate of the LCLs and order the OA to provide the resources necessary for its fulfilment. To avoid further delays the LCLs ask the Chamber to direct the OA to continue the LCLs international consulting resources, and to honour its agreement to permit the ILCL to determine the division of hours between the ILCL and the international consultant.

The LCLs therefore respectfully request that the Supreme Court Chamber:

(1) **AFFIRM** civil parties' right to effective representation under Internal Rules 12*ter* and 23(3);

(2) **QUASH** the OA's decision on the resourcing of the LCLs' team for the coming period; and

(3) **INSTRUCT** the OA to properly take into account relevant factors in its resourcing decisions;

(4) **INSTRUCT** the OA to provide sufficient resources to fulfil the LCLs mandate.

(5) **INSTRUCT** the OA to provide sufficient notice of its resourcing decisions, in writing, to allow the LCLs to plan their activities accordingly.

Respectfully submitted,

Date	Name	Place	Signature
28 October 2021	PICH ANG National Lead Co-Lawyer	Phnom Penh	
	Megan HIRST International Lead Co-Lawyer	Phnom Penh